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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1952

No. 734

ESTATE OF MABEL COCHRAN, Deceased; SIDNEY ELMER COCHRAN and DONALD ROBERT COCHRAN, Executors, and JOSEPH E. COCHRAN,
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

ELI FREED,
1069 Mills Building, San Francisco 4, California,
Attorney for Petitioners.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

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PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

To the Honorable Fred M. Vinson, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Estate of Mabel Cochran, deceased, Sidney Elmer Cochran and Donald Robert Cochran, Executors, and

(NOTE): Emphasis is supplied unless otherwise noted.

Joseph E. Cochran, petitioners, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered November 12, 1952, and also to review the order of March 3, 1953, in which the division of that Court which heard the case denied leave to file proffered petitions to vacate an order denying a rehearing *in banc* and to reinstate the petition for rehearing *in banc*.

OPINIONS BELOW.

The opinion of the Tax Court of the United States (R. 187) is reported in 10 T.C.M. 675, CCH Dec. 18, 458(M). The opinion of the Court of Appeals is reported in 201 F. (2d) 365, and the opinion of the Court on petition for rehearing, a dissenting opinion, is also reported in 201 F. (2d) 365.

JURISDICTION.

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1) and 26 U.S.C. Sec. 1141(a).

STATUTES INVOLVED.

The pertinent provisions of Internal Revenue Code, Sec. 22(a), 181, 182(c), 3797(a)(2), Treasury Regulations 111, Sec. 29.22(a)-1, and 28 U.S.C., Sec. 46(c) are printed in an appendix hereto.

QUESTIONS PRESENTED.

1. To establish validity for income taxes of a pre-1951 family partnership is it necessary for members who have substantial investments of income-producing capital in the business to prove that their capital did not result from gifts from their parents and that they performed services for and participated in the management of the business?

2. May a litigant petition a Court of Appeals for a rehearing *in banc* under 28 U.S.C., Sec. 46(c) after a decision by a three judge division; or may such division prevent the petition from being considered by the Court of seven judges, treating it as an ordinary petition for rehearing absent the request for *in banc* consideration, thus refusing it the stature of a petition for a rehearing *in banc?*

STATEMENT.

In 1937, entirely without sophistication, two unrelated families formed a partnership to do an automobile dealer business in Oakland, California. (R. 189.) The business required substantial capital which was invested in the aggregate in almost equal amounts by the two families. (R. 60.) The only issue before the Court involves the partnership income tax validity in 1942, 1943 and 1944 of the investments of two adult daughter members of the Cochran family, Bernice Cochran (Johnson) and Winifred Cochran (Irwin); respondent did not question the senior

Cochran, his wife, and three adult sons; respondent also did not question the senior Celli, his wife, and their two adult sons.

The capital invested in the business by the Cochran children was in equal amounts and came in exactly the same way by gifts from the parents and was at all times substantial. (R. 60.) The Cochran daughters were treated the same as their brothers because their father believed he was obligated to give them what he gave his sons. (R. 189.) The daughters did not render any services to the business and did not receive any salaries. (Mabel Cochran and Anna Celli, the mothers, also did not render any services.) All of the other partners rendered managerial services and received salaries. (R. 60, 190.) The partnership agreement permitted its dissolution by the daughters or any other partner on notice or at the end of any year and liquidation of their investments (capital and surplus) to them. (R. 36, 37, 38.) In the years involved herein (1942, 1943 and 1944) particularly, the two Cochran daughters made regular withdrawals for their personal use from their capital accounts. (R. 191, 192.)

Respondent determined income tax deficiences against petitioners (Joseph and Mabel Cochran) in their 1942, 1943 and 1944 income by including the distributive income of the partnership attributed to the partnership interests of the daughters. On appeal the Tax Court decided that respondent did not err: because the evidence failed to show the existence of any business purpose for bringing the two daughters

in the partnership or that there was any intent (bona fide) to include the daughters as partners in the business (R. 192), other than to treat the daughters the same as their brothers; because the daughters did not render any services and their investments originated as gifts from their parents.

On review the Court of Appeals affirmed *per curiam* "for the reasons given in the opinion of the Tax Court." (201 F. (2d) 365.) The dissenting opinion by Judge Pope followed the holding in the Second Circuit in *Levin v. Commissioner,* 199 F. (2d) 692, wherein the case was remanded to the Tax Court for redetermination free of the erroneous concept that pre-1951 family partnerships, for validity, require participation in management or rendition of services and contribution of non-gift capital.

REASONS FOR GRANTING WRIT.

The decision of the Court below failed to accept the decision in *Culbertson v. Commissioner,* 337 U.S. 733, and is in conflict with decisions of the Second Circuit and Fifth Circuit and further fails to take cognizance of the recently changed position of the Tax Court, a consideration to which petitioners are entitled since the decision of the Tax Court below is not yet final.

The Court below has also failed to accept and follow the proper practice in its judicial proceedings calling for the exercise of this Court's power of supervision.

I.

THE DECISION BELOW FAILS TO FULLY ACCEPT THE DECISION IN CULBERTSON v. COMMISSIONER, IS IN CONFLICT WITH THE SECOND AND FIFTH CIRCUITS, AND IS CONTRARY TO THE PRESENT POSITION OF THE TAX COURT.

The decision of the Tax Court below was entered July 16, 1951. In *Culbertson v. Commissioner,* supra, this Court decided that the validity of a family partnership was not *ipso facto* defeated because the contribution of capital was made by the donee of a intrafamily gift or that a donee of an intrafamily gift could not be a partner without rendering services; and that this concept was not authorized by *Tower,* 327 U.S. 280, and *Lusthaus,* 327 U.S. 293.

In *Levin v. Commissioner,* supra, decided November 12, 1952, the Second Circuit remanded the case to the Tax Court for further findings in respect to a son, who was refused recognition as a partner as compared with his mother and sister, because the Tax Court's finding of an absence of intent to make the son a partner was the result of an erroneous legal concept that his investment of gift capital alone (he rendered no services) was insufficient in "that active participation in the business must necessarily have been shown to establish the partnership status of the son." The Court decided that without that concept it was reasonable that a contrary finding would have been made. And the Court was correct. On remand November 28, 1952, the Tax Court promptly changed its findings and decision (December 17, 1952) and held the son

to be a partner (CCH Dec. 19,356(M)) pursuant to the recent changed position previously taken by the Tax Court in *Clarence B. Ford v. Commissioner* (November 12, 1952) 19 T.C. No. 29, CCH Dec. 19,289.

It is a coincidence that on the same day November 12, 1952, the Court below herein affirmed *per curiam* the Tax Court below, the Second Circuit decided *Levin v. Commissioner,* supra, and the Tax Court changed its position per *Clarence B. Ford v. Commissioner,* supra.

The Fifth Circuit recently indicated in *Marcus v. Commissioner,* Feb. 18, 1953, 201 F. (2d) 850, another of the reversals of the Tax Court by the Fifth Circuit, that it was perhaps the last in view of *Clarence B. Ford,* supra, in a long line of family partnerships cases in which the Tax Court incorrectly redetermined deficiencies, which would have to be dealt with by the Fifth Circuit. (See *Culbertson v. Commissioner,* after remand, 194 F. (2d) 581, and *Seabrook v. Commissioner,* 196 F. (2d) 332.) This conclusion by the Fifth Circuit is also supported by the change in position by the Tax Court in *Levin v. Commissioner,* after remand.

It is submitted that the decision of the Tax Court below contains the same defect found by the Second Circuit in the decision of the Tax Court in *Levin v. Commissioner.* (See dissenting opinion herein of Judge Pope, 201 F. (2d) 365, 366.) The Tax Court below, after referring to the fact that the two daugh-

ters during the years in question each withdrew for their own personal use profits from the business, said as follows:

> "On the other hand the evidence also showed that neither of them performed any services for the new partnership and their testimony failed to establish the fact that they had any voice in the management and control of the business. Furthermore, their investments of capital in the business did not originate with them but with their parents."

This language shows that the Tax Court assumed as a matter of law that the failure of the daughters to perform services and that their investments of capital resulted from gifts from their parents, destroyed the reality of the partnership so far as the daughters were concerned.

In view of the present state of the law on this subject by virtue of the decision of the Second Circuit in *Levin v. Commissioner,* supra, and the decision of the Tax Court in *Clarence B. Ford,* supra, and in *Levin v. Commissioner* after remand, this Court should grant this petition for certiorari.

II.

IT WAS ERROR TO DENY PETITIONERS THE RIGHT TO PETITION FOR A REHEARING IN BANC.

Petitioners duly filed a petition "for a rehearing and a reconsideration herein *in banc.*" The three

judge division which heard the case considered the petition as an ordinary petition for rehearing and it was denied, Judge Pope dissenting. Thereafter petitioners delivered to the clerk of the Court petitions to vacate the order denying the petition for a rehearing *in banc* and for leave to reinstate the petition for rehearing *in banc* since the request that the petition for a rehearing be considered *in banc* was not brought to the attention of the other active judges of the circuit to allow determination by a majority whether there should be a rehearing *in banc*. The same division denied leave to file said petitions.

The statute and practice.

The statute, 28 U.S.C., Section 46(c) provides for a rehearing *in banc* as well as a hearing *in banc*. In *Western Pac. R. R. Corp. v. Western Pac. Ry. Co.* (9th Cir. 1952) 197 F. (2d) 994, followed in *Bridges, et al. v. U. S.* (9th Cir. 1952) 201 F. (2d) 254, the Ninth Circuit decided that a litigant's petition for a rehearing *in banc* will be treated as an ordinary petition for a rehearing; that a litigant has no right to invoke the power of a majority of the circuit judges to determine whether a case is a proper one for determination *in banc*.

The United States Court of Appeals for the District of Columbia follows a practice and has rendered decisions which are in conflict with the decision of the Ninth Circuit. See Chief Judge Denman's dissenting opinion in *Western Pac. R. R. Corp. v. Western Pac. Ry. Co.*, supra, p. 1020, and 5 Stanford Law Review

332, 335 (in which the *Western Pac. R. R. Corp.* decision is commented upon).

It is submitted that since the statute provides for rehearing *in banc* and since rehearings *in banc* can be ordered only by a majority of the judges of the Ninth Circuit, a litigant must have the right to have his request presented in some reasonable way to all judges for consideration and action. Since there is no express rule authorizing petitions by litigants for a rehearing *in banc,* it is submitted that this Court or the Court below should provide a procedure for invoking the authority provided by 28 U.S.C., Section 46(c).

CONCLUSION.

It is respectfully submitted that this petition for certiorari be granted.

Dated, San Francisco, California,
April 10, 1953.

ELI FREED,
Attorney for Petitioners.

(Appendix Follows.)

Appendix

STATUTES INVOLVED.

1. Internal Revenue Code, Section 22. Gross Income.

(a) General Definition.—"Gross income" includes gains, profits and income derived from salaries, wages, or compensation for personal service * * *, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever.

2. Internal Revenue Code, Section 181. Partnership Not Taxable.

Individuals carrying on business in partnership shall be liable for income tax only in their individual capacity.

3. Internal Revenue Code, Section 182. Tax of Partners.

In computing the net income of each partner, he shall include, whether or not distribution is made to him——

* * * * * * *

(c) His distributive share of the ordinary net income or the ordinary net loss of the partnership, computed as provided in section 183 (b).

4. Internal Revenue Code, Section 3797. Definitions.

(a) When used in this title, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof——

* * * * * * *

(2) Partnership and Partner.—The term "partnership" includes a syndicate, group, pool, joint venture, or other unincorporated organization, through or by means of which any business, financial operation, or venture is carried on, and which is not, within the meaning of this title, a trust or estate or a corporation; and the term "partner" includes a member in such a syndicate, group, pool, joint venture, or organization.

* * * * * * *

5. Treasury Regulations 111.

Sec. 29.22(a)-1. What included in gross income.—Gross income includes a general compensation for personal and professional services, business income, profits from sales of and dealings in property, interest, rent, dividends, and gains, profits, and income derived from any source whatever, unless exempt from tax by law. (See sections 22(b) and 116.) In general, income is the gain derived from capital, from labor, or from both combined, * * *.

6. Title 28 U.S.C., Section 46(c).

Cases and controversies shall be heard and determined by a court or division of not more than three judges, unless a hearing or rehearing before the

court in banc is ordered by a majority of the circuit judges of the circuit who are in active service. A court in banc shall consist of all active circuit judges of the circuit.